

SENSITIVE

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6578

DATE COMPLAINT FILED: May 21, 2012
DATE OF NOTIFICATION: May 24, 2012
DATE OF LAST RESPONSE: Aug. 12, 2012
DATE ACTIVATED: Sept. 13, 2012

EXPIRATION OF SOL: Earliest - Apr. 18, 2017
Latest - May 15, 2017

COMPLAINANT:

Dr. Samuel M. Aanestad

RESPONDENTS:

Doug LaMalfa Committee and David Bauer in his
official capacity as treasurer
Doug LaMalfa
Mark Spannagel
www.sam4congress.com

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 433
2 U.S.C. § 434(c)
2 U.S.C. § 441d
2 U.S.C. § 441h
11 C.F.R. § 100.22
11 C.F.R. § 109.21
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Complainant, Dr. Samuel M. Aanestad, was a candidate in the June 5, 2012, Republican primary election for California's 1st congressional district. Aanestad alleges that one of his opponents, Doug LaMalfa, in coordination with LaMalfa's authorized committee and campaign staff, violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by creating a

RECEIVED
FEDERAL ELECTION
COMMISSION
2013 JUN 17 PM 4:43

CELA

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT
2013 JUN 13 AM 13:21

1-702-471-0100

1 website (www.sam4congress.com) expressly advocating Aanestad's defeat in the primary
2 election without the correct disclaimer. The Complaint also contends that the website was
3 attributed falsely to supporters of another primary candidate, Michael Dacquisto. *See* 2 U.S.C.
4 §§ 441d, 441h; 11 C.F.R. § 110.11; Compl. at 1-3 (May 16, 2012). Finally, the Complaint
5 alleges that, depending on the cost of the activity, Respondents may have violated the Act by
6 failing to file the necessary independent expenditure reports and by failing to register as a
7 political committee with the Commission.¹ *See* 2 U.S.C. §§ 433, 434(c); Compl. at 1-2.

8 Respondents LaMalfa, the Doug LaMalfa Committee (the "Committee"), and Campaign
9 Director Mark Spannagel submitted a joint Response denying all the allegations other than the
10 disclaimer allegation, which they request be transferred to the Alternative Dispute Resolution
11 Office. Resp. at 11 (Aug. 12, 2012).

12 We recommend that the Commission find reason to believe that the Committee and Mark
13 Spannagel violated 2 U.S.C. § 441d by failing to include the correct disclaimer on the subject
14 website. We also recommend that the Commission authorize an investigation to determine if the
15 violations were knowing and willful. *See id.* § 437g(a)(3), (a)(5)(B). Finally, we recommend
16 that the Commission find no reason to believe that the Respondents violated 2 U.S.C. §§ 441h,
17 434(c), or 433, and approve the attached Factual and Legal Analysis.

18 II. FACTUAL BACKGROUND

19 Prior to running for Congress, Aanestad, a dentist and oral surgeon, served as a member
20 of the California General Assembly and State Senate. *See* Compl. at 2; *About Sam*, Aanestad
21 Conservative for Congress, <http://www.samaanestad.com> (last visited Feb. 26, 2013). LaMalfa

¹ The Complaint also posits that Respondents might have violated 2 U.S.C. § 441b if they used corporate funds to pay for dissemination of the internet communication, but fails to allege any facts suggesting corporate funding, and we are not aware of any such facts. Compl. at 3. Our review of the available public information concerning the website did not reveal any corporate funding.

1 and Aanestad were candidates in the June 5, 2012, Republican congressional primary. Resp.,
2 Attach. 1, Ex. C.

3 Spannagel was LaMalfa's Chief of Staff in the California Senate and served as the
4 Committee's "Campaign Director" from April 2, 2012, to June 5, 2012.² Decl. of Mark
5 Spannagel ¶¶ 4-5 (Aug. 12, 2012) (included as Attachment 1 to the Response). The Committee
6 made numerous disbursements to Spannagel during the primary election period, including a
7 \$4,500 disbursement on April 17, 2012, described as a payment to "campaign staff," various
8 disbursements for transportation, mileage, lodging, meals, and parking, and one disbursement for
9 "media related services." See 12-Day Pre-Election Report at 48 (May 24, 2012); 2012 July
10 Quarterly Report at 54-58 (July 15, 2012). Spannagel's affiliation with the Committee continued
11 into the general election campaign period, and the Committee made a disbursement to him for
12 "media services" as late as August 31, 2012. See Amended October 2012 Quarterly Report at 89
13 (Dec. 7, 2012).

14 On or about April 18, 2012, Spannagel launched a website attacking Aanestad under the
15 domain name "www.sam4congress.com" (the "Website").³ Resp. at 1-2; Spannagel Decl. ¶ 8.
16 The Website included a quote attributed to a local newspaper, the *Record Searchlight*, describing
17 Aanestad as "Arrogant and out of touch" above the caption "Sam Aanestad Not for Congress."
18 *Id.* (emphasis in original). A block of text located above a picture of Aanestad stated, in
19 pertinent part, that "Unlike the real deal — the real Sam Aanestad has a long history of bad votes

² Following his successful campaign for Congress, LaMalfa appointed Spannagel as his Chief of Staff. See <http://www.contactingthecongress.org/cgi-bin/newtmemberbio.cgi?site=ctc2011&member=CA01> (last visited Feb. 27, 2013).

³ The Website was created on April 18, 2012, and registered under the domain name "sam4congress.com" through the free website builder, Wix.com. Compl., Ex. A (Letter from Wix.com to Barry Pruett, Esq., May 14, 2012). The username and e-mail address submitted in connection with the creation of the Website were "aanestadnotforcongress" and "aanestadnotforcongress@gmail.com," respectively. *Id.* According to records provided with the Complaint, Spannagel paid to establish the account. *Id.*

1 and out of touch elitism” and “isn’t the Principled Conservative he claims.” *Id.* On the bottom
2 right, another block of text stated “FYI Sam Aanestad is not an ‘Oral Surgeon’ or ‘Doctor’ as he
3 claims” and that this is “evidence of a long and deliberate habit of misleading to [sic] the
4 voters of the district.”⁴ Compl., Ex. B. (emphasis in original).

5 The Website also included a text block at the foot of the cover page stating “FREE
6 THINKERS FOR D’ACQUISTO.” Compl., Ex. B.⁵ This was apparently a reference to
7 Republican primary candidate Michael Dacquisto, who reportedly was alerted to the existence of
8 the Website by the Aanestad campaign. Torey Van Oot, *Aanestad Campaign: LaMalfa Aide*
9 *Behind Attack Website*, SACRAMENTO BEE (May 15, 2012), available at
10 [http://blogs.sacbee.com/capitalalert/latest/2012/05/sam-aanestad-campaign-says-doug-lamalfa-](http://blogs.sacbee.com/capitalalert/latest/2012/05/sam-aanestad-campaign-says-doug-lamalfa-aide-behind-attack-website.html)
11 [aide-behind-attack-website.html](http://blogs.sacbee.com/capitalalert/latest/2012/05/sam-aanestad-campaign-says-doug-lamalfa-aide-behind-attack-website.html).

12 Dacquisto states in a declaration attached to the Complaint that, although “the language
13 and its position on the website creates the impression it was authored and approved by an entity
14 known as FREE THINKERS FOR D’ACQUISTO,” he had never heard of “Free Thinkers for
15 D’Acquisto” until he viewed the Website. Decl. of Michael Dacquisto ¶¶ 4, 6 (May 2, 2012)
16 (included as Attachment C to the Complaint). He also says he had no connection with the

⁴ On or about May 7, 2012, Aanestad filed a lawsuit against Spannagel and the Committee for defamation. See *Samuel M. Aanestad v. Mark Spannagel, et al.*, Civ. No. 12-078512 (Cal. Super. Ct. Nev. Cnty. May 7, 2012), <http://caccess.nevadacourtscourts.com/eservices/home.page.7>; Trina Kleist, *Aanestad to File Elections Complaint over Political Website*, UNION (May 17, 2012), <http://www.theunion.com/article/20120517/NEWS/120519811>. Press reports indicate Aanestad dropped the lawsuit after Spannagel apologized for publishing the Website. Jenny Espino, *The GOP Tussle Is ‘All Over’; LaMalfa Aide Apologizes to Aanestad Over Bogus Website*, RECORD SEARCHLIGHT (Dec. 20, 2012), available at <http://www.redding.com/news/2012/dec/20/spannagel-apologizes-future-with-lamalfa-unclear/>. The lawsuit was formally dismissed January 14, 2013. See *Aanestad*, Civ. No. 12-078512, *supra*.

⁵ The original screenshot of the Website attached to both the Complaint and the Response reflect that it included links to four additional pages, captioned “NEWS,” “THE RECORD,” “WHERE’S SAM,” and “ENDORSEMENTS.” See Compl., Ex. B; Resp., Attach. 1, Ex. A. Neither source includes copies of any pages associated with those links, however, and the Response asserts that the Website consisted of only a “single” homepage. Resp. at 1.

1 creation or publication of the Website and did not give anyone permission to use his name in
2 connection with any such group. *Id.* ¶¶ 7-8.

3 On or about April 28, 2012, Spannagel made several key revisions to the Website. Most
4 significantly, he replaced the tag-line "Free Thinkers for D'Acquisto" with the text "100%
5 TRUE, 100% VERIFIABLE, 100% POLITICAL SATIRE" and removed the text asserting that
6 Aanestad's professional credentials were false. *Id.* ¶ 24. *Compare* Compl. Ex. B, with Resp.,
7 Attach. 1, Ex. A. Spannagel claims he removed the tag-line after he became concerned that it
8 might be mistaken for a disclaimer under the Act. Spannagel Decl. ¶ 24. Spannagel says he took
9 down the Website permanently on May 15, 2012, shortly after the Aanestad campaign objected
10 to its content. Spannagel Decl. ¶¶ 25, 27. Documents provided with the Response indicate that
11 the Website received 168 "unique visitors" from a total of 319 visits between April 18, 2012, and
12 May 14, 2012. *See* Resp. at 3, Attach. 1, Ex. D.

13 Respondents contend that Spannagel created the Website on his own initiative and
14 without the knowledge or assistance of LaMalfa, the Committee, or anyone connected with the
15 LaMalfa campaign. Resp. at 3, 8; Spannagel Decl. ¶ 10. Spannagel likewise asserts that he did
16 not "advise, consult or inform" LaMalfa or anyone associated with the Committee prior to or
17 during the production or launch of the Website. Spannagel Decl. ¶ 10. Spannagel explains that
18 he produced the Website in part to reflect his "own thoughts" on the "conservative credentials"
19 of LaMalfa and Aanestad — an ongoing issue during the primary campaign. *Id.* ¶¶ 15-16.
20 According to Spannagel, questions relating to Aanestad's professional qualifications also
21 surfaced during the campaign and became an "afterthought in assembling the Webpage." *Id.* ¶
22 18. Spannagel states that he conducted on-line research and, after concluding Aanestad was not
23 a "licensed" oral surgeon, included the information on the Website because it went to the

1 candidate's "credibility" and "veracity." *Id.* ¶¶ 18-20. Spannagel also denies that he intended
2 for the tag-line referencing Dacquist to suggest that the Dacquist campaign paid for or
3 authorized the Website. Instead, Spannagel claims that he included the tag-line to persuade
4 voters who supported Dacquist but might be considering supporting a more viable candidate
5 that Aanestad would be a poor choice. *Id.* ¶ 23.

6 Spannagel describes his authority to act for the Committee as limited, claiming that he
7 provided "general political consulting" as directed by Gilliard Blanning, the Committee's lead
8 political consultant for the primary election. Spannagel Decl. ¶¶ 5-6, 9. Spannagel also asserts
9 that his duties did not include producing content for or helping to maintain or administer the
10 Committee's website. *Id.* ¶ 9.

11 The Committee, for its part, relies heavily on the claim that Spannagel was not a
12 campaign employee. Instead, the Committee argues, Spannagel was an independent contractor
13 under a contract that was designed to prevent accusations that he performed campaign activity
14 while on the California Senate's payroll. Resp. at 5; Spannagel Decl. ¶ 6. According to the
15 Response, this contract "prohibited" Spannagel from becoming an employee and "did not
16 obligate him to perform any specific services." Resp. at 5. Spannagel also contends that the
17 contract provides that he would not "become an employee of the Committee" while the
18 agreement was in effect. Spannagel Decl. ¶ 7.

19 The Response states that Spannagel was not authorized "to undertake binding financial or
20 fiduciary actions on behalf of the Committee," was not under the Committee's control, and had
21 no "general or special nature" agency authority. Resp. at 6. Spannagel likewise maintains that
22 his contract with the Committee "did not provide [him] any authority, financial or equitable to
23 act on behalf of the Committee or the candidate." Spannagel Decl. ¶ 6. Finally, the Response

14041109M041

1 concludes that Spannagel's creation of the Website cannot be imputed to the Committee because
2 these acts were not within the ambit of Spannagel's contractual duties.⁶

3 Respondents contend that Spannagel paid for all expenses associated with the registration
4 and development of the Website using two personal credit cards. Resp. at 2; Spannagel Decl.
5 ¶¶ 11-12. Documents provided with the Response indicate that these expenses totaled \$135.22.
6 Resp., Attach. 1, Ex. B; *see* Spannagel Decl. ¶ 11. Spannagel also states that the Website was
7 produced at his residence using his personal computer and that "no assets, resources, goods or
8 services of the Committee or the State Senate office" were used in its production. Spannagel
9 Decl. ¶ 13.

10 According to Spannagel, he asked the Committee to report the \$135.22 he spent on the
11 Website as an in-kind contribution on its "May 25, 2012," disclosure report. Spannagel Decl.
12 ¶ 14. And the Committee's 12-Day Pre-Election report reflects a disbursement to Spannagel of
13 \$135.22 for "media related services" on April 18, 2012 — the same day Spannagel launched the
14 Website.⁷ *See* 2012 12-Day Pre-Election Report at 48.

⁶ Because Respondents did not provide a copy of this contract, we are unable to verify these claims directly. Spannagel's declaration, however, generally supports the assertions in the Response concerning the nature of the alleged contract with the Committee. *See* Spannagel Decl. ¶¶ 5-6, 9.

⁷ The Committee was not required to itemize the \$135.22 as a receipt because it was below the \$200 itemization threshold, and, since Spannagel had not contributed to the campaign, the receipt could not be aggregated with any other contributions. The Committee itemized the payment as a disbursement because it had disbursed amounts to Spannagel in excess of \$200 prior to April 18, 2012. *See* 11 C.F.R. §§ 104.3(a)(4)-(b)(4), 104.13(a)(1)-(2). The Committee did not identify the disbursement as an in-kind contribution in the applicable memo entry; based on our review of other likely in-kind contributions, however, it appears that the Committee did not customarily report in-kind contributions as such. Both RAD and the Commission's Congressional Campaign Guide encourage designating in-kind contributions in memo entries, but the practice is not required by the Act or Commission regulations. *See* Campaign Guide for Congressional Candidates and Committees at 94 (Aug. 2011).

III. LEGAL ANALYSIS

A. The Website Required a Disclaimer Identifying the Committee as Its Source

As the Complaint points out, the Act and Commission regulations require "all communications that expressly advocate" the election or defeat of a federal candidate to include a disclaimer that states whether the communications were coordinated with or independent of a candidate for federal office. Compl. at 3. The Response concedes that the Website included express advocacy but argues that the Act required Spannagel to include a disclaimer identifying himself as the source of the Website. Resp. at 11. We agree that the Website required a disclaimer. But we disagree that it should have identified Spannagel as the sponsor of the Website. The record provides reason to believe that Spannagel created and paid for the Website as an agent of the Committee. Therefore, we believe that the Committee violated the Act and the Commission's regulations by failing to identify itself as the Website's source.

Section 441d(a)(1) instructs that "[w]henever political committee makes a disbursement for the purpose of financing any communication . . . such communication, if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee." 2 U.S.C. § 441d(a)(1). Further, "all Internet websites of political committees available to the general public" must include a disclaimer. 11 C.F.R. § 110.11(a)(1).⁸

Spannagel asserts that he created and funded the Website without any involvement of the candidate or the Committee. Resp. at 2, 3; Spannagel Decl. ¶¶ 11-13. But the record provides

⁸ See generally, Internet Communications — Scope of Disclaimer Requirements, 71 Fed. Reg. 18,589, 18,600 (Apr. 12, 2006) (noting that the Commission's treatment of political committee websites is consistent with Congress's broad disclaimer requirements for political committees when they make a disbursement for a class of communications regardless of the content). The Website did not constitute communications placed for a fee on a third party's website and is therefore not a public communication. See 11 C.F.R. § 100.26.

1 reason to believe that Spannagel acted as the Committee's agent when he created the Website.

2 The Website, therefore, was a political committee's website that required a disclaimer.

3 Neither the Act nor 11 C.F.R. § 110.11 describe the scope of "agency" under the
4 disclaimer provision at 441d. The Commission has defined "agent" for purposes of
5 implementing the Bipartisan Campaign Reform Act of 2002, however, as "any person who has
6 *actual authority, either express or implied*" to perform certain actions described in the relevant
7 regulation. 11 C.F.R. §§ 109.3, 300.2 (emphasis added).⁹ The Commission has explained that
8 "actual authority is created by manifestations of consent (express or implied) made by the
9 principal to the agent." 71 Fed. Reg. at 4976 (citing Restatement (Second) of Agency § 7
10 (1958)).¹⁰

11 In its consideration of actual authority, the Commission articulated several agency
12 principles relevant here. The Commission recognized that "a person may be an agent as a result
13 of actual authority *based on his or her position or title within a campaign organization*, political
14 party committee, or other political committee." 71 Fed. Reg. at 4978 (emphasis added). A
15 candidate need not explicitly instruct his or her agent to perform a particular activity on her

⁹ The Commission defined the term "agent" in regulations addressing coordinated and independent expenditures (11 C.F.R. § 109.3) and the soft money ban (11 C.F.R. § 300.2(b)). *See* Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4976, 4978 (Jan. 31, 2006) (recognizing that defining "agent" to include both express and implied actual authority is a broad concept covering a wide range of activities, so that there is no need to include "persons acting only with apparent authority").

¹⁰ The Commission, therefore, excluded from its definition of agent those "persons acting only with apparent authority." 71 Fed. Reg. at 4975. The Commission explained in a prior statement concerning its definition of agent under the soft-money ban that "apparent authority is largely a concept created to protect innocent third parties who have suffered monetary damages as a result of reasonably relying on the representations of individuals who purported to have, but did not actually have, authority to act on behalf of principals. Unlike other legislative areas, such as consumer protection and anti-fraud legislation, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations. Rather, the Commission interprets Title I of BCRA to use agency concepts to prevent evasion or avoidance of certain prohibitions and restrictions by individuals who have actual authority and who do act on behalf of their principals. In this light, apparent authority concepts are not necessary to give effect to BCRA." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,082 (July 29, 2002).

behalf because actual authority can be established by implication. *Id.* (stating that the definition “capture[s] actions by individuals acting under indirect signals from a candidate”). “Moreover, under actual authority, a principal cannot avoid liability through attempts to keep himself ignorant of his or her agent’s actions.” *Id.* at 4979. And a principal is liable for the acts of an agent committed within the scope of his or her employment. Restatement (Second) of Agency § 7.07; *see, e.g., United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998) (affirming convictions against Sun-Diamond in connection with corporate contribution reimbursement scheme carried out by Sun-Diamond officer).

The scope of Spannagel's actual authority extended to his creation of the Website. Spannagel held the position of the Committee's "Campaign Director" during the relevant time period. His contract stated that he would provide "general political consulting" services. Indeed, Respondents state that the contract between Spannagel and the Committee was intended to deflect "accusations that Spannagel was spending time on campaign activities while on the [California] Senate payroll." Resp. at 7. Thus, Respondents appear to acknowledge that the Committee anticipated that Spannagel would in fact engage in "campaign activities" for LaMalfa — just not while on the California Senate payroll. Further, the Committee paid Spannagel for his "general political consulting" services. In fact, he was among the highest paid members of the primary election "campaign staff" retained by the Committee: the \$4,500 payment Spannagel received in April 2012 was higher than that of the campaign manager for that period, who was paid \$3,500. In addition, the Committee disbursed thousands of dollars to Spannagel for travel, meals, and mileage reimbursements. *See* 2012 July Quarterly Report at 54-58 (July 15, 2012).

Spannagel's own explanation of why he created the Website is consistent with providing general political consulting services. In his own words, he created the Website to focus on "ongoing [campaign] issue[s]," including the "conservative credentials" of the candidates and Aanestad's qualifications as an oral surgeon, and to persuade voters wavering in their support for Dacquisto to consider LaMalfa by convincing them not to vote for Aanestad "under any condition." Spannagel Decl. ¶¶ 16, 18. *See also id.* at 23 (stating that the "tag line was a call to arms . . . [to] people who were looking to break from Dacquisto").

Spannagel also promoted the LaMalfa campaign through a Twitter account, in which he detailed his involvement in the campaign as "currently electing Doug LaMalfa to Congress." TWITTER, <https://mobile.twitter.com/MSpannagel>. He also posted comments on state and federal politics with a focus on LaMalfa's congressional campaign, its positions, endorsements, and polling numbers, and recounted his participation in some LaMalfa campaign activities. These posts include statements such as "another busy day on the campaign trail," *id.* (May 4, 2012, 10:35pm), "great turn out @ Doug LaMalfa event," *id.* (May 4, 2012, 10:29am), and "another big campaign weekend in #cal. Events, walking, and endorsement. @DougLaMalfa has huge support in NorCal #cagop" *id.* (Apr. 14, 2012, 8:13pm).

In an effort to counter the assertion that Spannagel did not act as an agent of the Committee when he created the Website, the Response essentially relies on two arguments. First, it claims that the Committee retained Spannagel under a contract that encompassed only limited duties and "prohibited [Spannagel] from becoming an employee," thus making Spannagel an independent contractor. Resp. at 5; Spannagel Decl. ¶¶ 5-7. That reliance is misplaced. That the contract provided that Spannagel would not become a campaign employee did not preclude Spannagel from acting as an agent of the Committee. It is hornbook law that

1 independent contractor status does not preclude an agency relationship from forming — an
2 independent contractor “may or may not be an agent” depending on the circumstances.
3 Restatement (Second) of Agency § 2(3).

4 Second, the Response denies that Spannagel acted as an agent of the Committee because
5 no one associated with the Committee explicitly authorized him to create the Website, asserting
6 that his duties were limited to “general political consulting.” *Id.* at 3, 8; Spannagel Decl. ¶ 10.¹¹
7 This argument is also wide of the mark. Under settled agency principles, it does not matter
8 whether Spannagel was specifically directed to create the Website or whether the Committee was
9 unaware that he created it. The Committee would remain liable for its agent’s decision to do so,
10 so long as the activity was within the scope of the agent’s authority. *See* 71 Fed. Reg. at 4978-
11 79; Restatement (Second) of Agency §§ 216, 219(1). Lax oversight of an agent does not negate
12 the agency relationship. And as discussed above, the record demonstrates that the creation of the
13 Website fit squarely within the ambit of a “Campaign Director” retained to provide general
14 political consulting services.

15 We therefore conclude that Spannagel acted within his authority as an agent of the
16 Committee when he created the Website. And Respondents concede that Spannagel paid for the
17 Website. *Resp.* at 8; Spannagel Decl. ¶¶ 11-15. Commission regulations provide that if a
18 communication is “paid for and authorized by a candidate, an authorized committee of a
19 candidate, *or an agent of either*,” the disclaimer must clearly state that the communication has
20 been paid for by the authorized political committee. 2 U.S.C. § 441d; 11 C.F.R. § 110.11

¹¹ The Respondents also note that the Committee reported the costs of the Website as an in-kind contribution, at Spannagel’s request. *Resp.* at 8; Spannagel Decl. ¶ 14; *see also* 12-Day Pre-Election Report at 48 (May 24, 2012). We do not believe that this fact, when considered against the balance of the evidence in the record, is dispositive as to whether Spannagel was an agent of the Committee. Nor could it be: if so, a committee could circumvent the Commission’s definition of agent simply by ensuring that its agents each make an in-kind contribution to the committee.

1 (emphasis added). The Website, therefore, required a disclaimer stating that the Committee paid
2 for and authorized the communication. *Id.* Because it lacked such a disclaimer, we recommend
3 the Commission find that the Committee and its agent Spannagel violated 2 U.S.C. § 441d.¹²

4 We further recommend that the Commission authorize an investigation rather than pre-
5 probable cause conciliation with the Committee and Spannagel. Although the cost of creating
6 and publishing the Website was relatively small — approximately \$135 — the record strongly
7 suggests that the disclaimer violation was knowing and willful. *See* Spannagel Decl. ¶ 11; Resp.
8 Attach. 1, Ex. B. Spannagel admits that he was “familiar with the disclaimer notice requirements
9 under the FECA” and acknowledges that he removed the Website’s original tag-line — “Free
10 Thinkers for D’Acquisto” — because he feared it might be mistaken for a disclaimer under the
11 Act. Spannagel Decl. ¶¶ 22, 24. Indeed, when Spannagel altered the Website to omit the
12 misleading tag-line, he replaced it with a statement claiming that the contents of the Website
13 (although “100% true” and “verifiable”) were “political satire” — a statement perhaps designed
14 to deflect allegations that the deceptive disclaimer violated the Act, further tending to suggest his
15 consciousness of wrongdoing. Resp., Attach. 1, Ex. A. Spannagel’s apparent intentional scheme
16 to mislead potential voters and conceal the connection between the Website and the Committee
17 warrants further Commission inquiry.

18 Accordingly, we recommend that the Commission authorize an investigation to
19 determine whether the failure to include the correct disclaimer was knowing and willful. While
20 we intend to conduct this investigation informally, we also request that the Commission approve

¹² See, e.g., MUR 5924 (Nguyen) (finding reason to believe that a campaign committee and its agent violated 2 U.S.C. § 441d); MUR 6138 (Hunnicut) (same). The Complaint also identified www.sam4congress.com as a Respondent and this Office provided the Website with notice and an opportunity to respond. The Website no longer is accessible to the public and appears to be defunct. Because we conclude that the Website was created and maintained by Spannagel as an agent of the Committee within the scope of his authority, we see no reason to separately pursue the Website in addition to the Committee. Accordingly, we recommend that the Commission dismiss the allegations as to the Website in the exercise of the Commission’s prosecutorial discretion.

1 compulsory process should our informal attempts to gather relevant information prove
2 inadequate.

B. The Respondents Did Not Fraudulently Misrepresent Campaign Authority

5 The Act prohibits federal candidates and their employees or agents from fraudulently
6 misrepresenting themselves, or any committee or organization under their control, as speaking or
7 otherwise acting on behalf of any other candidate or political party on a matter that is damaging
8 to such other candidate or party. 2 U.S.C. § 441h(a); 11 C.F.R. § 110.16(a)(1). Under section
9 441h(a)(2), it is also unlawful to “willfully and knowingly” participate in a plan or scheme to
10 violate 2 U.S.C. § 441h(a)(1); 11 C.F.R. § 110.16(a)(2). The Complaint alleges that
11 Respondents violated this provision by falsely attributing the Website’s attack on Aanestad to a
12 “pseudonymous” organization (“Free Thinkers for D’Acquisto”). Compl. at 5-6. Respondents
13 deny violating 2 U.S.C. § 441h based on their claim that Spannagel was solely responsible for
14 the Website and was not an employee or an agent of a candidate for federal office as required by
15 the statute. *Id.*

16 We disagree with Respondents' proffered defense. But for a different reason, we agree
17 that there is no violation of section 441h(a). Section 441h(a) prohibits fraudulently
18 misrepresenting that a candidate or political party is the source of a communication that is
19 damaging to that candidate or party. For example, section 441h(a) would sanction a candidate
20 who distributes letters containing statements damaging to an opponent if the letters are
21 fraudulently attributed to that opponent. *See* Disclaimers, Fraudulent Solicitation, Civil
22 Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,968 (Dec. 13, 2002).
23 Here, the federal candidate that the Website "damaged" was Aanestad. To violate 2 U.S.C.
24 § 441h, the Website would have had to misrepresent that its source was Aanestad, the targeted

1 candidate. The Website contains no such suggestion.¹³ Accordingly, we recommend that the
2 Commission find no reason to believe that Respondents violated 2 U.S.C. § 441h.

3 **C. The Costs Associated with the Website Do Not Satisfy the Thresholds for**
4 **Independent Expenditure Reporting or Political Committee Status**

5 Any person who is not a political committee and makes more than \$250 in independent
6 expenditures with respect to a given election in a calendar year, as defined in the Act and
7 Commission regulations, must file an independent expenditure report. 2 U.S.C. § 434(c);
8 11 C.F.R. § 109.10(b).

9 The Complaint alleges that Respondents were required to file an independent expenditure
10 report or statement if the costs associated with the Website exceeded \$250. Compl. at 4. They
11 did not. The record reflects that the costs associated with the creation, launch, and maintenance
12 of the Website did not exceed \$250. *See* Spannagel Decl. ¶ 11 (identifying the total cost of the
13 Website as \$135.22). Accordingly, we recommend that the Commission find no reason to
14 believe that Respondents violated 2 U.S.C. § 434(c).

15 The Complaint also alleges that Respondents may have made expenditures in connection
16 with the Website that triggered the registration requirements of the Act. Compl. at 5; *see*
17 2 U.S.C. § 433. The Act defines a political committee as "any committee, club, association, or
18 other group of persons which receives contributions aggregating in excess of \$1,000 during a
19 calendar year or makes expenditures aggregating in excess of \$1,000 during a calendar year."

¹³ The URL address for the Website, Sam4Congress, might falsely indicate that Aanestad sponsored the Website himself. But the nature of the Website's attack on Aanestad, the Website's caption "Sam Aanestad not for Congress," and the tag-line suggesting it was sponsored or otherwise associated with "Free Thinkers for D'Acquisto" all militate against drawing that inference from the URL address. We also do not believe that the use of a false tag-line attributing the communication to a fictional entity ostensibly connected to candidate Michael Dacquisto results in a violation of section 441h. Although Dacquisto provided a declaration denying that he had a role in publishing the Website, neither he nor the Complaint allege that Dacquisto was damaged by the apparent association of his candidacy with the Website. *See* Dacquisto Decl. ¶ 7. Accordingly, the Website — which targets Aanestad — does not appear to be a communication in Dacquisto's name "on a matter which is damaging to" him. 2 U.S.C. § 441h(a)(1); 67 Fed. Reg. at 76,968-69.

2 U.S.C. § 431(4)(A). Even assuming the other elements of the definition of political committee were satisfied, the expense required to create, host, and maintain the Website does not meet the \$1,000 statutory threshold for political committee status. Further, as discussed above, the Committee is responsible for and funded the Website, and the Committee registered as a political committee with the Commission. We therefore recommend that the Commission find no reason to believe that Respondents violated 2 U.S.C. § 433.

IV. RECOMMENDATIONS

1. Find reason to believe that the Doug LaMalfa Committee and David Bauer in his official capacity as treasurer, and Mark Spannagel violated 2 U.S.C. § 441d.
2. Find no reason to believe that the Doug LaMalfa Committee and David Bauer in his official capacity as treasurer, Doug LaMalfa or Mark Spannagel violated 2 U.S.C. § 441h.
3. Find no reason to believe that the Doug LaMalfa Committee and David Bauer in his official capacity as treasurer, Doug LaMalfa or Mark Spannagel violated 2 U.S.C. § 434(c).
4. Find no reason to believe that the Doug LaMalfa Committee and David Bauer in his official capacity as treasurer, Doug LaMalfa, or Mark Spannagel violated 2 U.S.C. § 433.
5. Dismiss the allegations that www.sam4congress.com violated the Act.
6. Approve the attached Factual and Legal Analysis
7. Authorize the use of compulsory process.

8. Approve the appropriate letters.

Anthony Herman
General Counsel

By:

Daniel A. Petalas
Associate General Counsel
For Enforcement

Peter G. Blumberg
Assistant General Counsel

Marianne Abely
Attorney

Date

6/17/13

NOT FOR DISTRIBUTION